and the context made it clear that the legatee was not to take beneficially, the bequest failed. *In re Keenan*, 94 N. Y. Supp. 1099.

In withholding the beneficial interest in the legacy from the legatee the decision is undeniably correct.[1] Common justice, at least, would forbid that he should hold beneficially, in the face of the express provision to the contrary in the will, and his own acquiescence in the oral instructions which lay back of the legacy. A trust, then, will be impressed upon the property in his hands, and the only open question is who should be the *cestui*. As to this question there are two well-known theories. One is, that the testator, having in himself the legal and equitable interests in the property, has given only the legal interest to the trustee; that the oral instructions are inoperative, because, without being duly executed in the testamentary form, they purport to dispose of the testator's beneficial interest upon his death; wherefore there is intestacy as to the beneficial interest, which accordingly passes to the next of kin.[2]

The unsoundness of this doctrine arises from the fact that the testator could not have had, in himself, both the legal and equitable interests as distinct things. For, as an equitable interest is merely a right *in personam* against a trustee, and the deceased could not have had a right of action against himself, he therefore could not have been intestate as to any such right. The full and absolute ownership of the property has, therefore, passed to the legatee. The legatee, however, by his express or tacit assent to the oral instructions of the testator has made a contract which the courts of equity specifically perform by enforcing the trust relation when the legacy vests. The oral instructions cannot be objected to under the Statute of Frauds, as the trust which they declare is one of personalty; nor under the Statute of Wills, since they effect the passage of no property from the testator. They tend simply to prove a personal obligation from a legatee to the orally designated *cestuis que trust*.[3] This theory of a contract on the part of the legatee is applicable to any case where the wishes of the testator are communicated to the legatee before he takes, not only when the bequest is on its face qualified but when it is absolute in form.[4] Even on this point, however, there is some dissent.[5]

RECENT CASES.

ADMIRALTY — TORTS — DIVISION OF DAMAGES BETWEEN TWO TORTFEASORS. — The plaintiff's ship collided with the ship "Caravellas," and the next day with the ship "Haversham Grange." Each inflicted damage upon the plaintiff's ship which made docking necessary, and in the dock both injuries were repaired simultaneously, those caused by the "Haversham Grange" being finished in six, those inflicted by the "Caravellas" in twenty-two days. The plaintiff sued the "Haversham Grange" for three days' dock dues and three days' demurrage. *Held*, that the plaintiff may recover the dock dues, but not

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[1] Taylor *v.* Plaine, 31 Md. 158.

[2] See Lewin, Trusts, 11th ed., p. 58; Olliffe *v.* Wells, 130 Mass. 221; Heidenheimer *v.* Bauman, 84 Tex. 174.

[3] See 5 HARV. L. REV. 389; Curdy *v.* Berton, 79 Cal. 420; Cagney *v.* O'Brian, 83 Ill. 72.

[4] Reech *v.* Kennegal, 1 Ves. 123.

[5] See Campbell *v.* Brown, 129 Mass. 23.

demurrage. *The Haversham Grange*, 21 T. L. R. 628 (Eng., C. A., June 28, 1905).

The question is in what proportion the damages shall be divided between two tortfeasors. It is an English rule of admiralty that if two parties are each obliged to dock a vessel for repairs which are executed simultaneously, the cost of docking must be divided between both parties for the period during which both are at work on the vessel. *Marine Ins. Co.* v. *China Transpacific S. S. Co.*, 11 App. Cas. 573. Evidently the case at hand falls, as to dockage, directly under this special rule. But no case lays down a similar rule as to demurrage, which question must be settled by the strict logic of legal causation. Where the inevitable consequence of A's tort is a delay of twenty-two days, and B's tort, which occurs subsequently, would have caused a delay of six days, but in fact does not increase the delay already caused, it can scarcely be said that B's tort is a proximate cause of any of the delay, so as to render B liable therefor. *Cf. Kuhn* v. *Delaware, etc., R. R. Co.*, 99 Hun (N. Y.) 74. Both the upper and the lower court took this view, although it seems hard to reconcile logically with the rule as to dock dues.

BANKS AND BANKING — DEPOSITS — ELECTION OF REMEDIES FOR PAYMENT OF REVOKED CHECK. — A bank paid a check to the payee after payment had been forbidden by the drawer. In an action by the drawer against the bank, evidence showed a former action by the same plaintiff against the payee for the amount of the check. *Held*, that the bank is liable, since the former action was not a ratification of the payment. *Pease & Dwyer Co.* v. *State National Bank*, 88 S. W. Rep. 172 (Tenn.).

Under the Negotiable Instruments Law adopted in Tennessee revocation of a check before payment destroys any right of the payee in the fund and thus renders the bank liable for subsequent payment, as though no order had been drawn. Although a bailor might sue both the bailee for breach of the bailment and the receiver of the chattel in trover, the absence of a specific chattel renders this case distinguishable. See *Riley* v. *Albany Savings Bank*, 36 Hun (N. Y.) 513, 522; affirmed in 103 N. Y. 669. The bank's payment may be regarded as the act of a volunteer ratified by suit based upon it. *Cf. Simpson* v. *Eggington*, 10 Exch. Rep. 845. It has even been said that suing the payee is adoption of the payee as the maker's agent for receiving payment, and hence a defense to the bank. *Riley* v. *Albany Savings Bank*, *supra*. But the better reason seems to be that, by electing to pursue one of several inconsistent remedies, the plaintiff foregoes the others. *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450. Any action by the depositor against the payee is premised upon the bank's nonliability and necessarily is inconsistent with a claim against the bank. But on whatever theory, it seems the former suit should be a bar.

CARRIERS — WHO ARE PASSENGERS — GRATUITOUS CARRIAGE OF EMPLOYEE. — A section hand was injured through the derailment of the work train in which he was riding home from work. *Held*, that he is still an employee, and not a passenger. *Southern Indiana Ry. Co.* v. *Messick*, 74 N. E. Rep. 1097 (Ind., App. Ct.).

Whether a railway employee occupies the position of a passenger depends on the facts of each case. It is evident that an employee who is on a train in the course of his employment is not a passenger. *Travelers' Insurance Co.* v. *Austin*, 116 Ga. 264. It is equally evident that an employee who is traveling on business in no way connected with the railroad is for the time being a passenger. *Doyle* v. *Fitchburg R. R. Co.*, 162 Mass. 66. But the present case is one of the confusing middle class in which injuries are received riding to or from work. A simple distinction that will be found to reconcile most of the decisions is that the employee should not be regarded as a passenger when he is using a privilege granted specially to employees as such. Judged by this test, the present decision is sound, for the work train was provided only for employees. On the other hand, a street railway employee riding home on a regular car like any passenger who has a pass is to be considered a passenger. *Peterson* v. *Seattle Traction Co.*, 23 Wash. 615. For a further discussion of the question presented, see 11 HARV. L. REV. 340; 14 *ibid.* 620; 17 *ibid.* 423.

CARRIERS — WHO ARE PASSENGERS — WHEN RELATION BEGINS. — The plaintiff, desiring to become a passenger of a car, signaled to the motorman, who checked its speed. The plaintiff then attempted to board the car while it was still in motion. *Held*, that he is a passenger while in the act of boarding the car. *Lewis* v. *Houston Electric Co.*, 88 S. W. Rep. 489 (Tex., Civ. App.).

It is well established that carriers owe the highest care to passengers. It often becomes important, therefore, to determine just when the relation of carrier and passenger begins. The theory is that there must be an offer and an acceptance to a consensual relation, not to a contractual relation, as courts sometimes loosely state, for it is well settled that a carrier owes a public duty independently of contract. See *McNeill* v. *Railroad Co.*, 135 N. C. 682. Some courts regard the carrier as the offerer and hold that the acceptance is not made until the offeree has actually boarded the car. *Donovan* v. *Hartford Street Ry. Co.*, 65 Conn. 201. The better opinion supported by the weight of authority, however, considers the signal to the motorman as the offer and the checking of the car as the acceptance. *Brien* v. *Bennett*, 8 C. & P. 724; *McDonough* v. *Met. R. R. Co.*, 137 Mass. 210. To hold otherwise would be unfair to the person boarding the car since thereby the highest care would be denied when most needed.

COMPOSITIONS WITH CREDITORS — EFFECT — JOINT DEBTORS. — A and B were makers of a joint note. A being insolvent, his creditors made an oral agreement to take ten shillings on the pound. This amount had never been paid to the holder of the note, who attempted to prove in bankruptcy against B. *Held*, that the promise of A had been taken in satisfaction of any claim against him and that the other joint debtor is thereby discharged. *In re Pearse*, 1905 Vict. L. Rep. 446.

The rule generally laid down is that only a release under seal to one of two joint debtors will release the other. *Line* v. *Nelson*, 38 N. J. Law 358. Still a seal is not necessary where there is consideration for the release. *Heckman* v. *Manning*, 4 Col. 543. So it has been held in both England and America that where there has been an accord with one joint debtor and the satisfaction agreed upon has been rendered, the other debtor is discharged, whether the agreement was under seal or not. *In re E. W. A.*, [1901] 2 K. B. 642; *Booth* v. *Campbell*, 15 Md. 569; but see 15 HARV. L. REV. 491. Several cases have been found in which a composition agreement containing a release under seal has discharged a joint debtor not a party thereto. *Merritt* v. *Bucknam*, 90 Me. 146. From the facts reported in the case at hand, the court seems to have gone a long way in finding that it was the promise which was taken in satisfaction of the claims. Connecting this with the fact that the agreement was merely oral and that the consideration which supports a composition with creditors is of a very questionable kind, the case illustrates a considerable extension of the original rule.

CONFLICT OF LAWS — CHANGE OF SOVEREIGNTY — LAW GOVERNING IN TERRITORY CEDED BY STATE TO UNITED STATES. — The plaintiff's intestate, while working in the United States Navy Yard in Brooklyn, was killed through the negligence of the defendant. When the state of New York in 1853 ceded jurisdiction over this tract of land to the federal government, a state statute existed allowing an action for causing death; but this was repealed in 1880, and another of a similar nature passed. There had been no legislation by Congress. *Held*, that the defendant is liable. *McCarthy* v. *Packard Co.*, 105 N. Y. App. Div. 436.

When a state cedes to the United States jurisdiction over territory which is used by the latter for certain public purposes, such as the erection of forts and dock-yards, the laws of the state continue in force in such territory until abrogated or changed by federal legislation. *Chicago, etc., Ry. Co.* v. *McGlinn*, 114 U. S. 542. Such territory, however, ceases to be a part of the state and becomes a separate unit subject to the exclusive jurisdiction of the federal government. *Cf. Commonwealth* v. *Clary*, 8 Mass. 72. Hence it follows that the statute passed by the state of New York after the cession did not affect the

law of the ceded territory, but as there had been no legislation by Congress upon this matter the law existing at the time of the transfer was still in force. The defendant therefore was clearly liable. The hesitation of the court to declare whether the Act of 1880 or the earlier law governed was probably due to a former decision of questionable soundness. *Cf. Barrett* v. *Palmer*, 135 N. Y. 336.

CONFLICT OF LAWS — EXECUTION OF POWER — WHAT LAW DETERMINES SUFFICIENCY OF WILL AS EXECUTION OF POWER. — Testatrix, who had under an English will a testamentary power of appointment over personalty, died domiciled in France, leaving an unattested codicil which was valid by French law and which contained a universal legacy, but made no reference to the power or the property subject thereto. *Held*, that the codicil does not constitute an exercise of the power, § 27 of the Wills Act not applying. *In re Scholefield*, 21 T. L. R. 675 (Eng., Ch. D., July 14, 1905). See NOTES, p. 122.

CONFLICT OF LAWS — JURISDICTION — QUASI IN REM GARNISHMENT OF DEBT OWED BY NON-RESIDENT. — A North Carolina debtor of a North Carolina creditor, while temporarily visiting Maryland, was garnisheed by a Maryland creditor of his obligee. By statute the non-resident debtor had ample opportunity to litigate the claim of the garnishment judgment. *Held*, that, under the "full faith and credit" clause of the Federal Constitution, the Maryland garnishment judgment is a bar against a subsequent action on the original indebtedness in North Carolina. Two justices dissented. *Harris* v. *Balk*, 198 U. S. 215.

In holding that a debt may be garnisheed wherever the garnishee may be found, the Supreme Court takes the logical step from its previous position that the debt owing to a non-resident may be garnisheed at the domicile of his debtor. *Chicago, etc., Ry. Co.* v. *Sturm*, 174 U. S. 710. The court finally repudiates the artificial doctrine of the *situs* of a debt, and bases the jurisdiction on the court's control over the garnishee-debtor. The fundamental objection is still unanswered, that the power to discharge the debt, which is the effect of allowing the garnishment judgment as a plea in bar, can be founded only on control over both the debtor and the creditor. See 17 HARV. L. REV. 188. The decision is, however, salutary in settling the deplorable conflict as to the validity of these garnishment proceedings. Further, the Court takes pains to protect the non-resident debtor-creditor by its requirement of due notice from the garnishee, to enable him to contest the claim. There still remains for settlement the diversity as to the materiality of the place for payment of the debt in conferring jurisdiction. Doubtless, the Supreme Court will produce uniformity on the whole subject by sustaining the jurisdiction in all cases. *Cf. Wyeth, etc., Co.* v. *Lang & Co.*, 127 Mo. 242; *Tootle* v. *Coleman*, 107 Fed. Rep. 41.

CONFLICT OF LAWS — PERFORMANCE OF CONTRACTS — PROVISION RENDERING INSURANCE POLICY SUBJECT TO FOREIGN LAW. — The defendant, a life insurance company incorporated under the laws of New York, issued a policy in Australia to the plaintiff, providing that he receive an equitable proportion of its surplus at the end of a specified period, and expressed to be "subject to the laws" of the former state. Subsequently the legislature of New York enacted that a decree for an accounting by an insurance company be granted only upon application of the Attorney-General. At the end of the specified period the plaintiff filed a bill in a New South Wales court asking for an account of the proportion of the defendant's surplus due to him. *Held*, that the New York statute is a bar to the plaintiff's bill. *Johnson* v. *Mutual Life Ins. Co.*, 5 N. S. W. 16.

Where, as in the present decision, the provisions of an insurance policy are admittedly valid under the laws of the place of contracting, an express stipulation that the obligations thereunder shall be defined by the laws of a foreign state, is regularly enforced. *Phinney* v. *Mutual Life Ins. Co.*, 67 Fed. Rep. 493; *Mutual Life Ins. Co.* v. *Hill*, 118 Fed. Rep. 708. The New York court has interpreted the statute in question to affect a change in the law of procedure

only. *Swan* v. *Mutual, etc., Association*, 155 N. Y. 9. Whether it became a term of the contract depends therefore solely on whether the express provision properly includes a change in procedure as well as in substantive law. According to a principle of the conflict of laws only the rules of substantive law applicable to a contract may differ from the law of the forum. *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304. Consequently, if this statute is interpreted to be a part of the contract, the plaintiff's only remedy is in New York. The clause in the policy is ambiguous, and if construed most strongly against the insurer, according to the general rule, seems not to include a statutory regulation of procedure restricting the remedy of the insured to a foreign jurisdiction. But aside from the statute the court might properly have denied an account in a controversy concerning the internal management of a foreign corporation. *Clark* v. *Mutual, etc., Association*, 14 App. D. C. 154.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — CHANGE OF REMEDIES. — A Maryland statute made each shareholder of a trust or banking corporation liable in an action at law to any creditor of the corporation for double the par value of the stock held. A subsequent statute, which changed the remedy to a bill in equity by all the creditors against all the shareholders, was made retroactive in effect so as to abate all actions at law then pending. *Held*, that the statute is unconstitutional. *Myers* v. *Knickerbocker Trust Co.*, 139 Fed. Rep. 111 (C. C. A., Third Circ.).

Though the Court of Appeals of Maryland recognized that the statutory liability of shareholders to creditors of a corporation is contractual in its nature, yet it decided that the statute here involved did not impair the obligation of contracts. *Miners' & Merchants' Bank* v. *Snyder*, 59 Atl. Rep. 707. A distinction was early taken between the obligation of a contract and the remedy to enforce the obligation. See *Sturges* v. *Crowningshield*, 4 Wheat. (U. S.) 122, 200. From this, some courts inferred that the remedy could be changed at will or absolutely withdrawn. See *Read* v. *Frankfort Bank*, 23 Me. 318, 321. But the federal courts, followed by the decided weight of authority, take the position that the remedy existing when the contract was made is part of the obligation. *Edwards* v. *Kearzey*, 96 U. S. 595. Clearly, therefore, all remedy cannot be taken away. See *Call* v. *Hagger*, 8 Mass. 423, 430. The state may, however, alter the form of the remedy or limit the time for its application. *Paschall* v. *Whitsett*, 11 Ala. 472, 478. It may likewise provide a new or more effective remedy, as this could in no way impair the obligation. But in professing to change merely the remedy the state must not impair rights accruing under the contract; and the substituted remedy must be substantially as effective as before. *Western Nat. Bank of New York* v. *Reckless*, 96 Fed. Rep. 70. In the case under consideration the obligation seems clearly impaired.

CONSTITUTIONAL LAW — VESTED RIGHTS — LEGISLATIVE AUTHORIZATION OF NUISANCES. — The defendant railroad located its main line, together with a freight yard and depot, near enough to the plaintiff's premises to cause her serious inconvenience and discomfort. *Held*, that the plaintiff may recover for such injury, although the value of her land and buildings has not been diminished. *St. Louis, etc., Ry. Co.* v. *Shaw*, 88 S. W. Rep. 817 (Tex., Civ. App.). See NOTES, p. 127.

CONTRACTS — CONSTRUCTION — IMPLIED PROMISE TO USE DILIGENCE IN FORWARDING TO COMMISSION AGENT. — A company engaged the plaintiff to sell goods for it on commission, but was so negligent in not delivering on time, that the plaintiff failed to earn many commissions he otherwise might have obtained. For this the plaintiff brought action. *Held*, that he cannot recover, since no promise to use due diligence can be implied from the contract to employ. *Byrns* v. *United Telpherage Co.*, 105 N. Y. App. Div. 69.

The general rule is that a promise will be implied whenever it is necessary to give to the transaction the effect which both parties intended. *Ogdens, Ltd.* v. *Nelson*, [1903] 2 K. B. 287. On this principle, where a doctor sold his practice in consideration for a part of the future profits, the court implied a promise by the vendee "to take common and ordinary care to carry on the business so

as to realize receipts"; and the vendee was held liable for going out of practice. *M'Intyre* v. *Belcher*, 14 C. B. (N. S.) 654. Similarly a contract to employ a commission agent has been held to include an implied promise to furnish goods. *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544. If, then, the company had entirely stopped sending goods, it would have been liable. But, so far as the parties are concerned, the effect of not sending any goods is equivalent to that of sending them so late that no one will buy. In each case, the plaintiff loses commissions through the default of the defendant; and in each, the original agreement is shorn of "the effect which both parties intended." It would seem, therefore, that a clearer instance of an implied promise could hardly be found.

CONTRACTS — DEFENSES — IMPOSSIBILITY BY DOMESTIC LAW. — A lessee covenanted to pay certain rent and to use the demised premises for no purpose except that of a saloon. At the time the lease was executed a law was in force by which any county might adopt prohibition by popular vote. Before the term began, but after the lease was executed and delivered, the county, in which the demised premises were, did so adopt prohibition and thereby rendered it impossible to use the premises for a saloon. *Held*, that the lessee is not absolved by such impossibility from either covenant. *Houston Ice, etc., Co.* v. *Keenan*, 88 S. W. Rep. 197 (Tex., Sup. Ct.).

The court treats an impossibility created by the application of domestic law as analogous to a supervening impossibility of fact, and to determine whether performance should be excused applies the test of ability to foresee. For a discussion of the principles involved, see NOTES, 18 HARV. L. REV. 384.

COPYRIGHT — INFRINGEMENT — MUSICAL COMPOSITION. — The plaintiff brought suit to restrain the infringement of copyrights of two songs, which the defendant company had reproduced and sold in the form of perforated records, designed for use with mechanism to play the compositions on a musical instrument. *Held*, that a musical composition is not subject to copyright, but only its material embodiment in the form of a writing or print, and that the perforated sheet is not an infringement of such copyright. *White-Smith Pub. Co.* v. *Apollo Co.*, 139 Fed. Rep. 427 (Circ. Ct., S. D., N. Y.).

At common law, the owner of an unpublished composition has an absolute property therein, but this right is lost on publishing. DRONE, COPYRIGHTS 102, 116. Congress has power to secure "for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." U. S. Const., Art. 1, § 8. The term "writings" includes all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. *Lithographic Co.* v. *Sarony*, 11 U. S. 53. The musical conception, then, as an idea, is not subject to copyright. *Ditson Co.* v. *Littleton*, 67 Fed. Rep. 905. At the time of publishing the composition, a statutory copyright may be acquired, which gives the proprietor of any musical composition the exclusive liberty of copying and vending the same. U. S. Comp. St. 1901, § 4952. A copy is "that which comes so near to the original as to give every person seeing it the idea created by the original." *West* v. *Francis*, 5 Ban. & A. 737, 743. The perforated roll does not suggest the original to the eye, but is a mere part of the mechanism intended to produce the sound of the melody. The decision reached by the court is logical, and is supported both in England and in this country. *Boosey* v. *Whight*, [1900] 1 Ch. 122; *Kennedy* v. *McTammany*, 33 Fed. Rep. 584.

CORPORATIONS — FOREIGN CORPORATIONS — CONDITIONS UPON RIGHT TO DO BUSINESS: WHETHER COMPLIANCE CREATES A NEW CORPORATION. — A Kentucky statute required that no foreign railroad corporation should operate within the state until it should have become a corporation of the state, and provided that it might become incorporated by filing a copy of its charter, and that "thereupon . . . such company . . . shall at once become and be a corporation, citizen, and resident of this state." A foreign railway company complied with the statute, but, as a foreign corporation, paid a corporation franchise tax. *Held*, that the railway is not liable to pay a second franchise tax,

since it has not become a separate domestic corporation. *Commonwealth* v. *Chesapeake, etc., R. R. Co.*, 27 Ky. Law Rep. 1084.

A state's right to dictate the conditions upon which a foreign corporation may do business enables it to require reincorporation as a domestic corporation. Whether compliance amounts to more than a license to the foreign corporation is a question of legislative intent, but statutes in substantially the same language have been generally construed as creating within the state a second distinct corporate entity. *Debnam* v. *Southern, etc., Tel. Co.*, 126 N. C. 831. The present decision escapes some of the curious anomalies which follow the general view. See 13 HARV. L. REV. 597. But it would seem that an equally just result might have been reached, avoiding double taxation, through a more obvious construction of the statute: that as a condition precedent to entering Kentucky, the foreign corporation formed a new domestic corporation which was taxable; that the old corporation, not doing business in the state, was not taxable; and that not the second tax, but the first, was void. The case seems distinguishable from a late decision of this court holding that such a corporation as the defendant is not within a statute levying an organization tax. *Cf. Cincinnati, etc., Ry. Co.* v. *Commonwealth*, 26 Ky. Law Rep. 1106.

DOMICILE — GOVERNMENT OFFICIAL AT WASHINGTON. — On a petition for divorce, it appeared that the petitioner had left Tennessee with his family in 1882. Since that time he had lived in Washington, where he held a civil service position in the Treasury Department. He had made three short trips to Tennessee, and had voted there at those times. He testified that it had always been his intention to return to Tennessee if he should lose his position. Section 4203 of the Code provides that a divorce may be granted where the petitioner has resided in the state for the two years next preceding the filing of the petition. *Held*, that the petitioner has lost his domicile in Tennessee, and the court is without jurisdiction. *Sparks* v. *Sparks*, 88 S. W. Rep. 173 (Tenn.).

Divorce is regulated by the law of the domicile of the parties. *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517. Residence as used for the purposes of divorce is equivalent to domicile. *Shaw* v. *Shaw*, 98 Mass. 158. Domicile means a person's legal home. It requires both the *animus* and the *factum*. *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307. The intention is itself a question of fact, to be determined by evidence, the declarations of the party not being conclusive. *In re Craignish*, [1892] 3 Ch. 180. In England an intention to remain permanently is necessary. *Bell* v. *Kennedy*, *supra*. In the United States a less settled intention will be sufficient, as, for instance, to remain while one is working in a town, or while a student, provided the person has no other home. *Wilbraham* v. *Ludlow*, 99 Mass. 587; *Putnam* v. *Johnson*, 10 Mass. 488. The Tennessee court seems to have considered that the acquisition of an actual home in Washington with the intention of remaining there for an indefinite time countervailed declarations of intention to return to Tennessee upon the happening of an uncertain future event. *Cf. Mooar* v. *Harvey*, 128 Mass. 219. The result seems consistent with the general conception of this subject held by the American courts.

ELECTIONS — DISCRIMINATION IN FORM OF BALLOT. — A statute provided that squares be printed opposite the names of parties on the official ballot, and that citizens who so desired might vote a straight ticket by marking a single cross. *Held*, that this provision does not impair the freedom and equality of elections. *Oughton* v. *Black*, 61 Atl. Rep. 346 (Pa.).

A difference in the labor of preparing a ballot is not conclusive of real impairment of the constitutional principle of freedom and equality of elections. See *Todd* v. *Election Commissioners*, 104 Mich. 474. Since the ballot must be limited in size, a statute that restricts representation on it to parties that received a certain percentage of the vote at the last election is reasonable so long as the voter may insert other names at will. *Plimmer* v. *Poston*, 58 Oh. St. 620. But if he is confined to the printed names, the better view is that his freedom of choice is impaired. *Lamar* v. *Dillon*, 32 Fla. 545. A law that names of candidates nominated by two parties be printed but once on the ballot

is sound, although the voter may be inconvenienced thereby. *Runge* v. *Anderson*, 100 Wis. 523. A statute like that in the present case has been upheld. *Ritchie* v. *Richards*, 14 Utah 345. But one with an added proviso invalidating ballots containing other marks was declared unconstitutional as tending to disfranchisement, since a cross opposite the name of a party that had nominees for less than the full number of offices would cast no vote for the others, and an attempt to fill in the blanks would invalidate the whole ballot. *Eaton* v. *Brown*, 96 Cal. 371. These illustrations go to show that mere inconvenience is not impairment, and fully support the reasoning of the decision under consideration.

ESTOPPEL — PARTIES ESTOPPED — ESTOPPEL AGAINST STATE AND UNITED STATES. — In accordance with an established custom, but under a misconstruction of law, accounts of a marshal, covering certain services rendered by his deputies, were approved by the court to which they had been presented at intervals during his term of service, and were allowed by the proper officials of the Treasury Department. The money was paid by the government with knowledge that the greater part of it would be paid over by the marshal to his deputies. In an action by him, five years after his retirement from office, during which time the government had made no complaint of these payments to him, it set them up as a counterclaim. *Held*, that it is estopped. *Walker* v. *United States*, 139 Fed. Rep. 409 (Circ. Ct., M. D., Ala.). See NOTES, p. 126.

EVIDENCE — DOCUMENTS — CARBON COPIES AS DUPLICATE ORIGINALS. — *Semble*, that in an action of assumpsit against a carrier for loss of goods, a carbon copy of the letter sent to the carrier notifying it of the loss is admissible as a duplicate original. *Chesapeake & Ohio Ry. Co.* v. *Stock & Sons*, 51 S. E. Rep. 161 (Va.). See NOTES, p. 123.

EVIDENCE — DOCUMENTS — RECITAL IN ANCIENT DEED NOT ADMISSIBLE TO PROVE RELATIONSHIP. — An ancient deed reciting that the grantors were heirs of a former owner was offered as evidence of such fact. There was no proof that possession of the premises had been held under the deed. *Held*, that the evidence is not admissible. *Lanier* v. *Hebard*, 51 S. E. Rep. 632 (Ga.).

Ancient deeds have been admitted in some jurisdictions as evidence of a relationship therein recited, though the courts have differed as to the requirement of possession under them as a condition precedent to their admission. *Deery* v. *Cray*, 5 Wall. (U. S.) 795; *Scharff* v. *Keener*, 64 Pa. St. 376; *contra*, *Fort* v. *Clarke*, 1 Russ. 601. Although the court in the principal case might have excluded the evidence on the sole ground that possession had not been shown, yet it went further and intimated that even if possession had been shown the evidence would not have been admitted. This position seems sound. Recitals of relationship in a recent deed are generally held inadmissible. *Costello* v. *Burke*, 63 Ia. 361. There would appear no reason for a different rule in the case of ancient deeds. The fact of ancientness should be effective merely to authenticate the instrument, and should not remove the necessity of complying with the requirements of the pedigree rule. It is to be observed that in most of the cases where the evidence has been received this rule has not been infringed. *Cf. Fulkerson* v. *Holmes*, 117 U. S. 389.

EXECUTORS AND ADMINISTRATORS — RIGHTS — EXERCISE OF RIGHT OF RETAINER AGAINST JUDGMENT CREDITOR. — The plaintiff, in a suit upon a debt, recovered judgment *de bonis testatoris* against the defendant, who was the executrix under a will. The defendant herself was owed a debt by the testator, but did not plead *plene administravit* or a right of retainer. Later the plaintiff obtained an order for the administration of the testator's estate, which proved to be insolvent. The defendant thus claimed to be entitled to exercise her right of retainer against the plaintiff. *Held*, that she cannot do so. *In re Marvin*, 21 T. L. R. 765 (Eng., Ch. D., Aug. 10, 1905).

The common law right of an executor to retain from the assets of the estate in priority to other creditors of equal degree an amount owed him by the testator, though abolished or modified by statute in about all the states of this coun-

try, still obtains in England. *In re May*, 45 Ch. D. 499. Furthermore this right is not destroyed by a decree for the administration of the estate. *Nunn* v. *Barlow*, 1 Sim. & St. 588. A judgment, however, recovered by a creditor against an executor who does not plead *plene administravit* or a similar plea alleging insufficiency of assets, is conclusive upon him that he has assets to satisfy such judgment. *Ramsden* v. *Jackson*, 1 Atk. 292. From this it would seem to follow that he could not later assert his right of retainer to the prejudice of this creditor. See *In re Hubback*, 29 Ch. D. 934, 941. There would appear no reason, however, why he should not retain against other creditors. *Cf. Wilson* v. *Coxwell*, 23 Ch. D. 764. But since the loss of his right to retain against the judgment creditor is due to the executor's own fault, it would seem that he should bear the burden of this loss and retain from the other creditors only the amount by which their dividends would have been diminished had he pleaded properly.

JUDGMENTS — FOREIGN JUDGMENTS — ENFORCEMENT OF DORMANT JUDGMENT IN SISTER STATE. — A judgment was obtained against the testator in Kansas. In an action thereon brought in Rhode Island against his executor, the defendant pleaded that the testator had died more than one year previous, and that the action was therefore barred under Gen. Stat. Kan. 1901, § 4883. *Held*, that in an action on a judgment of a sister state the *lex fori* governs rather than the *lex loci*, and that the plaintiff may accordingly recover. *First National Bank* v. *Hazie*, 61 Atl. Rep. 171 (R. I.).

A state has power to prescribe the remedies which it will allow within its jurisdiction. The statute of limitations is held to affect the remedy and not the right, and the *lex fori* will in general prevail. *M'Elmoyle* v. *Cohen*, 13 Pet. (U. S.) 312. But when a judgment is barred in the jurisdiction where obtained, the rule is somewhat doubtful, though unquestionably a state may allow an action in such a case. *Miller* v. *Brenham*, 68 N. Y. 83. Nevertheless, as the whole question is one founded on public policy, the better opinion, which is supported by the weight of authority, would appear to sustain the view that an action on a judgment barred by the laws of the state of its promulgation should not be allowed in another state, as it would seem a mere gratuity for a sister state to give it greater efficacy than its home tribunal. *St. Louis, etc., Co.* v. *Jackson*, 128 Mo. 119. A judgment barred by special statute applying to personal representatives of a decedent, as in the case at hand, is a dormant judgment equally with one barred by general statute. *Mawhinney* v. *Doane*, 40 Kan. 676. The result reached by the court may be supported, however, on the alternative holding that the plea did not bring the right of action within the Kansas limitation.

JUDGMENTS — FOREIGN JUDGMENTS — RIGHT OF FOREIGN CORPORATION TO SUE. — The plaintiff, a foreign corporation, recovered judgment in Missouri on a contract made in Texas and sought to enforce that judgment in the latter state. The defendant alleged that the plaintiff at the time of the contract had not applied for or else had forfeited his permit to do business in Texas and hence could not sue there upon the judgment, since it was a demand arising out of the contract within the provisions of Rev. Civ. St. 1895, arts. 745, 746. *Held*, that if such facts concerning the permit are proved, the plaintiff cannot recover on the judgment. *St. Louis, etc., Co.* v. *Beilharz*, 88 S. W. Rep. 512 (Tex., Civ. App.).

It has been said in a case cited as a precedent for this decision that before enforcing a sister-state judgment under the "full faith and credit" clause of the Federal Constitution (Art. 4, § 1) a court may ascertain whether the claim upon which it is based is such a one as that court has jurisdiction to enforce. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265. This rule has already been practically confined to penal judgments, which are distinguishable upon the ground that the real plaintiff is not a citizen but the foreign state itself, and judgments in favor of citizens alone are entitled to extra-territorial recognition. See *Huntington* v. *Attrill*, 146 U. S. 657. Since a corporation, also, is not a citizen, within U. S. Const., Art. 4, § 2, a state may as it sees fit refuse to entertain its suits. *Anglo-*

American Prov. Co. v. *Davis Prov. Co., No. 1*, 191 U. S. 373; see also 17 HARV. L. REV. 417. Upon the basis of this right the principal case can be supported if the judgment can be said to be a demand arising out of the contract, upon which the Texas statute forbids a foreign corporation to sue.

LARCENY — CONSENT — AGENT. — The prisoner was by agreement allowed to take from the prosecutor's pile of ashes as much as he wanted at a certain price per ton, upon the understanding that the amount taken should be weighed by the prosecutor's agent, who was to enter the weight in a record book. The weigher in collusion with the prisoner entered in the book a ton and a half less than was weighed out. *Held*, that the prisoner is guilty of larceny of the ton and a half. *Rex* v. *Tideswell*, [1905] 2 K. B. 273.

As the court points out, the title had not passed to the prisoner before the entry in the book, because the weigher and the prisoner were conspirators against the prosecutor, and therefore the weigher lost his power as agent to transfer title to the prisoner. *Regina* v. *Hornby*, 1 C. & K. 305. This violation of the owner's possession was without his consent. True, at the time of his agreement with the prisoner he consented to the latter's taking what he might need, but this consent was given only upon condition that the ashes be weighed and the correct weight entered in the book. In the nature of things consent to a present taking cannot be upon condition, yet consent to a future taking may be. If the condition is unfulfilled, the taking is without consent and is therefore larceny. *Carrier's Case*, Y. B. 13 Edw. IV. 9, pl. 5. As larceny must be of specific property, it would seem that the conviction for the ton and a half can best be supported by proof of the larceny of the total amount taken. See *State* v. *Martin*, 82 N. C. 672.

MUNICIPAL CORPORATIONS — CONTRACTS — PATENTED ARTICLES. — The defendant advertised for bids for making street improvements, specifying that a patented pavement would be required and stating that the patentees had agreed with the city to sell to any bidder, at a certain price, the necessary materials therefor. A bill was filed to enjoin the letting of the contract on the ground that such a specification was in contravention of the statute requiring contracts for street improvements to be let to the best and lowest bidder. *Held*, that the defendant has no power to make such a specification. *Monaghan* v. *City of Indianapolis*, 75 N. E. Rep. 33 (Ind., Ct. App.).

The objection to the proposed contract was that it required the use of an article subject to a monopoly, while the statute called for competitive bidding. Had the specifications simply required the use of materials already in the possession of the city, obtained in the open market, no objection would have arisen. The decision is a perfectly logical result of a literal interpretation of the statute, but it is opposed to the prevailing and preferable rule that the city may make contracts like the one here contemplated. *Hobart* v. *The City of Detroit*, 17 Mich. 246; *contra*, *Dean* v. *Charlton*, 23 Wis. 590. The basis of the prevailing doctrine is that it was not the intention of the legislature, which gave the city power to make improvements, to prevent it from using patented articles when they should be desirable and beneficial. The rule laid down in the case under consideration has not proven satisfactory where longest in use. See Wis., P. & L. Laws, 1869, c. 316, § 2; *Kilvington* v. *The City of Superior*, 83 Wis. 222.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — RECOVERY BY MUNICIPALITY AGAINST NEGLIGENT CONTRACTOR. — The defendant company gave its bond to perform the provisions of an ordinance requiring it to save and keep the city fully indemnified from all damages that might occur from any of the company's acts. The city sued the defendant in tort for the amount of a judgment rendered against the city for a defect in a street, caused by the defendant's negligence. *Held*, that the city may not recover in tort, but must seek its remedy on the bond, which defines and limits its rights. *City of Pawtucket* v. *Pawtucket Electric Co.*, 61 Atl Rep. 48 (R. I.).

In a case like this the defendant would, in the absence of a bond, be answerable to the municipality in tort. *City of Rochester* v. *Montgomery*, 72 N. Y.

65. Whether or not the bond should bar the plaintiff from such form of action must depend upon the intention of the parties as expressed therein. The presumption is that the bond is simply a collateral remedy, giving the municipality a greater security up to a certain amount, yet not waiving its right to recover in excess of that amount. Under such circumstances it seems that the agreement should not be construed as exclusive of the common law rights of the plaintiff unless such construction is necessitated by its clear import or by necessary conclusion from its terms. Such an interpretation would be in accordance with the analogy of statutes, which are construed strictly when they tend to alter the common law. *Cf. Shaw* v. *Railroad Co.*, 101 U. S. 557.

NEGLIGENCE — DEFENSES — EFFECT OF A CRIMINAL STATUTE ON THE DEFENSE OF ASSUMED RISK. — The plaintiff, a servant, brought action against his master, for injuries caused by the unguarded condition of the latter's machinery. The defendant pleaded that his servant had full knowledge and assumed the risk. The plaintiff demurred to the plea. *Held*, that the demurrer must be sustained, on the ground that the defendant had failed to comply with a criminal statute making it a misdemeanor not to guard machinery of this character. One justice dissented. *Hall* v. *West and Slade Mill Co.*, 81 Pac. Rep. 915 (Wash.).

By the common law, in occupations attended with unusual danger the master is bound to use all reasonably obtainable appliances for the prevention of accidents. *Mather* v. *Rillston*, 15 Sup. Ct. Rep. 464. But a servant who knows of the defective condition of the premises and continues to work thereon, is barred by contributory negligence from recovery for injuries caused by such defect. *Lewis* v. *New York, etc., R. R. Co.*, 153 Mass. 73. In general a statute will not be construed to alter the common law unless it appears that such was the intention. *Langlois* v. *Dunn Worsted Mills*, 25 R. I. 645. The legislature, in a number of similar statutes, has deemed it necessary expressly to cut off the defense of assumed risk, as pointed out by the dissenting opinion. The statute in the case at hand is criminal in form, and has no such provision. Wash., Laws 1903, c. 37. In the absence of express provision, or of clearly expressed intent, the better opinion seems against giving to such statutes an interpretation which destroys the defense of assumed risk. *Knisley* v. *Pratt*, 148 N. Y. 372; *O'Maley* v. *South Boston Gas Light Co.*, 158 Mass. 135.

PARTNERSHIP — RIGHTS AND REMEDIES OF CREDITORS — ASSUMPTION OF DEBTS BY CONTINUING PARTNER. — *Held*, that a creditor of a partnership, having notice of its dissolution and of the continuance of the business by one partner who assumes the firm debts, must sue the continuing partner alone and exhaust the partnership assets in his hands before he is entitled to a judgment against the partners jointly. *Morrisey* v. *Berman*, 94 N. Y. Supp. 596.

The result here reached seems clearly wrong on the following grounds: the proposition that a creditor of a solvent partnership must have recourse to the firm property before he can reach the individual property of the partners is without foundation, the separate estates of the partners being liable in the first instance. LINDLEY, PARTNERSHIP, 7th ed., 229; *Stevens* v. *Perry*, 113 Mass. 380. Though by the arrangement between the partners the retiring partner becomes surety for the other, a surety may be sued upon default of his principal before any action is taken against the principal. *Penny* v. *Crane Brothers Mfg. Co.*, 80 Ill. 244. Furthermore, there being no novation, the creditor's right to sue both original debtors cannot be altered by an agreement between the debtors alone.

POWERS — EFFECT OF APPOINTMENT TO REMAINDERMAN. — By a will probated in 1869, a testator left an estate in trust for his daughter for life, remainder to her heirs, subject however to a power given to the daughter to appoint the remainder in fee among her heirs and collateral relatives. This daughter died in 1904, leaving a will in which she exercised her power in favor of her daughter who was her only heir and was alive at the time of the testator's death. *Held*, that the granddaughter takes under the will of 1869, and not under the

power of appointment, and that a transfer tax established in 1897 can not be imposed upon the property. *In the Matter of Lansing*, 182 N. Y. 238.

The position taken by the court, that the appointee can elect either to take under the appointment or to retain the estate which by the law of New York vested in her on the death of her grandfather, seems untenable. The legal condition imposed by the will of the grandfather, which should divest the heir of her estate, has happened. To hold that she can determine whether or not it shall have any effect, is virtually to deny that it is a legal condition. A possible explanation of the decision is that, since the appointment operates to give the appointee substantially the same estate which she would have had in default of any exercise of the power, it is void. However, this theory has been properly repudiated. *Sweetapple* v. *Horlock*, 11 Ch. Div. 745. The appointment has all the necessary formal elements; and that it does not change the *quantum* of the appointee's estate, seems no sufficient reason for holding it invalid. For a discussion of another aspect of the case, see NOTES, p. 122.

RAILROADS — RAILROAD CROSSINGS — DUTY TO WHISTLE ON APPROACHING CROSSING. — The trial court charged that it was negligence, as a matter of law, for the defendant's engineer to fail to give warning of the train's approach to a bridge under which ran a highway. The defendant excepted. *Held*, that the instruction is erroneous, since the question of the defendant's negligence is for the jury. *Louisville & N. R. Co.* v. *Sawyer*, 86 S. W. Rep. 386 (Tenn.).

In almost all jurisdictions in this country, there are statutes requiring that some warning of a train's approach to a grade-crossing be given. And even where no such statute exists there is authority that failure to give warning is negligence *per se*. See *Favor* v. *Boston, etc., Corporation*, 114 Mass. 350; *contra*, *Ellis* v. *Great Western Ry. Co.*, L. R. 9 C. P. 551. In the present case, though recognizing that there may be such a duty in regard to crossings at grade, the court nevertheless refuses to extend it to non-grade crossings. *Cf. Pennsylvania R. R. Co.* v. *Barnett*, 59 Pa. St. 259. This decision seems correct. The danger incident to the failure to give warning of an approaching train is so much greater in the case of a grade than in that of a non-grade crossing that there is little justification for applying the strict rule in the latter case. Furthermore, this distinction between the two kinds of crossings has been recognized in those decisions which hold that a statute requiring a warning to be given by trains before reaching crossings does not apply to non-grade crossings. *Cf. Jenson* v. *Chicago, etc., R. R. Co.*, 86 Wis. 589.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — AGREEMENTS CONCERNING COPYRIGHTS AND PATENTS. — Publishers formed an association the members of which agreed to sell copyrighted books only to those jobbers and booksellers who would maintain the net prices fixed by the individual members of the combination. *Semble*, that the combination is illegal as violating the Sherman Anti-trust Law. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. Rep. 155 (Circ. Ct., S. D. N. Y.). See NOTES, p. 125.

RESTRICTIONS AS TO THE USE OF PROPERTY — ENFORCEMENT OF RESTRICTIONS: WHO MAY ENFORCE. — The legislature of Massachusetts in 1861 granted to the Massachusetts Institute of Technology a block of land in the city of Boston with the restriction that it should not "cover with its buildings more than one-third of the area granted." The surrounding lots fronting on this square were subsequently sold by the state for prices considerably influenced by the fact that the lots faced this partially open square. No mention of the restriction was made in the deeds to the purchasers. In 1903 the legislature authorized the Institute of Technology to build over their entire block. A bill for an injunction was filed by a sub-purchaser of one of the lots sold by the state to enforce the original stipulation. *Held*, that the injunction be issued. *Wilson* v. *Massachusetts Institute of Technology*, 75 N. E. Rep. 128 (Mass.).

The real point at issue in this case was as to whether this restriction was imposed for the benefit of the neighboring land or for the advantage of the

state. The fact that the state itself was the original grantor would be an element tending to support the latter view. The decision, therefore, exemplifies in an emphatic manner the inclination of courts to regard such restrictions as made for the benefit of the neighboring land. For a further discussion of the principles involved, see 18 HARV. L. REV. 535.

TRADE-MARKS AND TRADE-NAMES — THE RIGHT TO TRADE IN ONE'S OWN NAME — TRADING ON ANOTHER'S REPUTATION. — The parties dissolved their partnership in "The Simon Auction Co." The old business was continued under a new name by the plaintiff, who tried to enjoin the defendant, though the latter was now engaged in a different kind of business, from using the old name. *Held*, that the plaintiff is not entitled to the injunction, since the defendant is not using the name so as to mislead the public or defraud the plaintiff of any trade to which he is entitled. *Blanchard Co.* v. *Simon*, 51 S. E. Rep. 222 (Va.).

For a discussion of the principles involved, see 18 HARV. L. REV. 56.

TRUSTS — CONSTRUCTIVE TRUSTS — FORGED TRANSFER OF STOCKS. — The defendant company was induced to transfer the plaintiff's registered bonds to bearer through a resolution of the latter's board of directors and a power of attorney, both forged by its delinquent treasurer. The power of attorney was witnessed by the other defendant, a member of the New York Stock Exchange, as required by the rules of that body, making such endorsement "a guarantee of the correctness of the signature of the party in whose name the stock stands," and was forwarded by him with the certificates to the defendant company. The plaintiff now brings suit for the bonds, and the defendant company seeks indemnity against the broker. *Held*, that the plaintiff can recover, and the defendant company is entitled to indemnity. *Clarkson Home* v. *Missouri, etc., Ry. Co.*, 182 N. Y. 47.

The defendant innocently presented a forged transfer-deed of stock and received from the plaintiff company new certificates which were in turn transferred to a *bona fide* purchaser. When the forgery was later discovered, the plaintiff was forced to issue equivalent stock to the true owner and now seeks indemnity from the defendant. Neither party was negligent. *Held*, that the defendant is liable. *Corporation of Sheffield* v. *Barclay*, 93 L. T. 83 (Eng., H. of L., July, 1905).

The House of Lords now reverses the judgment of the Court of Appeals and reinstates that of Lord Alverstone which was noticed in 16 HARV. L. REV. 228. For a full discussion of the subject see two articles in 17 *ibid.* 373 and 543. The New York decision, which is a case of first impression in that jurisdiction, might well have been rested on the broader grounds enunciated in the latter article.

TRUSTS — CREATION AND VALIDITY — WHETHER BEQUEST ON SECRET UNDERSTANDING CREATES A TRUST. — A testator bequeathed to J. D. two legacies; one "to be expended by him, as I have instructed him during my lifetime"; the other, "for his personal use." *Held*, that the first bequest is invalid, as an unsuccessful attempt to create a trust. *In re Keenan*, 94 N. Y. Supp. 1099. See NOTES, p. 128.